

SUPREME COURT OF QUEENSLAND

CITATION: *Trust Co of Australia Ltd v Commissioner of Stamp Duties*
[2001] QCA 278

PARTIES: **TRUST COMPANY OF AUSTRALIA LIMITED**
(ACN 004 027 749)
(appellant)
v
COMMISSIONER OF STAMP DUTIES
(respondent)

FILE NO: Appeal No 10819 of 2000

DIVISION: Court of Appeal

PROCEEDING: Case Stated

DELIVERED ON: 20 July 2001

DELIVERED AT: Brisbane

HEARING DATE: 22 May 2001

JUDGES: McMurdo P, Thomas JA, Helman J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made.

ORDER: **Appeal dismissed. Questions answered as follows:**
Question (a) Yes;
Question (b) Unnecessary to answer;
Question (c) Unnecessary to answer;
Question (d) Unnecessary to answer;
Question (e) No;
Question (f) Yes; and
Question (g) The costs of and incidental to the stating of
this case should be borne and paid by the appellant.

CATCHWORDS: TAXES AND DUTIES – STAMP DUTIES – APPEAL,
CASE STATED ETC – appeal by way of case stated under s
24 *Stamp Act* 1894 against assessment of duty on transfer
form pursuant to which appellant was transferee of real
property but not purchaser – where appellant transferee a
custodian under the contract of sale for the purposes of the
purchaser’s dealer’s licence and the *Corporations Law*

TAXES AND DUTIES – STAMP DUTIES – WHAT
TRANSACTIONS OR INSTRUMENTS ARE LIABLE –
CONVEYANCE OR TRANSFER ON SALE – whether
stamp duty payable on both contract of sale and transfer
because transferee not purchaser

TAXES AND DUTIES – STAMP DUTIES –
EXEMPTIONS

Corporations Law, Ch 5C, s 784
Stamp Act 1894 (Qld), s 24, 49, s 54

Dudley Buildings Pty Ltd v Rose (1993) 49 CLR 84,
considered
Egmont v Smith (1877) 6 Ch D 469, considered
Re Davies [1989] 1 Qd R 48, considered
*Littlewoods Mail Order Stores Ltd v Inland Revenue
Commissioners* [1963] AC 135, considered

COUNSEL: D Russell QC, with M Robertson, for appellant
K Dorney QC, with D Marks, for respondent

SOLICITORS: Creagh Weightman Lawyers for appellant
Crown Law for respondent

- [1] **McMURDO P:** I agree with the reasons for judgment of Helman J.
- [2] Like Thomas JA, I am conscious that the appellant entered into the contract of sale in this form in order to comply with the requirements of its dealer's licence to operate managed investment schemes under the Corporations Law. The licence required the appellant to appoint a custodian to hold scheme property unless certain conditions were met. There is no suggestion the appellant was structuring his arrangements to attempt to avoid the payment of stamp duties. Indeed, the respondent has indicated that such transactions have been exempt from stamp duties since 17 November 2000 under the *Revenue Laws Amendment Act 2000 (Qld)*.
- [3] But as Helman J has demonstrated, the Form 1 Transfer was an instrument within the meaning of s 49(1)(a) *Stamp Act 1894 (Qld)* and the exemptions under s 54(6) and s 54(6A) have no application.
- [4] I agree with the order proposed and the answers to the questions for this Court's determination proposed by Helman J.
- [5] **THOMAS JA:** In this matter the Commissioner has exacted *ad valorem* stamp duty twice in respect of what was in substance a single sale of property. The relevant parties did not seek to avoid duty on the sale of the property or engage in manoeuvres for any extraneous purpose. In relation to the acquisition of a property they simply followed the rather complicated requirements of the *Corporations Law* and the *Managed Investments Act 1998 (Commonwealth)* which are designed to protect members of the public in relation to managed investment schemes. Those provisions require the appointment of a “custodian” to hold the relevant property.
- [6] The State of Queensland has now apparently recognised the undesirability of subjecting entities to additional duties by reason of their compliance with such statutory requirements. There is now an express exemption applicable to a situation

such as the present one¹. However this provision only took effect on 17 November 2000 and is not retrospective.

- [7] The reasons of Helman J, with which I agree, demonstrate that the relevant provisions of the *Stamp Act* at the time of this transaction permitted the commissioner to assess duty on both the contract and the transfer. One of the principal submissions addressed to us by the appellant was that it was a “purchaser” under s 54(6) and therefore not chargeable with any duty on the transfer. Whilst the term “purchaser” may bear different connotations in different contexts, I find Dixon J’s statement in *Dudley Buildings Pty Ltd v Rose*² to be of assistance:
- “The position of purchaser involves contractual obligations as well as rights. The very expression ‘purchaser’ connotes some of these obligations.”

I do not think that the documents in this case make the appellant a “purchaser” within the meaning of s 54(6).

- [8] For the reasons stated by Helman J it is the court’s duty to uphold the assessment.
- [9] I agree with the orders and answers proposed by Helman J.
- [10] **HELMAN J:** This is an appeal by way of a case stated under s. 24 of the *Stamp Act* 1894 against an assessment of duty by the respondent on a transfer form pursuant to which the appellant was the transferee of real property.
- [11] By a written contract of sale dated 29 November 1999 it was agreed that there be a sale and purchase of land and improvements on it at 301 Coronation Drive, Milton, Brisbane. The purchase price was \$17,500,000, subject to adjustment in accordance with the terms of the contract. The parties to the agreement were a company called Riverfront Developments Pty Ltd which was designated in the contract ‘Vendor’, a company called Cromwell Property Securities Limited designated ‘Purchaser’, and the appellant designated ‘Custodian’. I shall refer later to relevant clauses in the contract. In the meantime it is necessary to explain how it was that Cromwell and the appellant came to enter into the contract with Riverfront Developments in the way they did.
- [12] On 1 September 1997 Cromwell was granted a dealer’s licence under s. 784 of the *Corporations Law*. On 15 March 1999 the Australian Securities and Investments Commission varied the conditions of the licence. As varied it authorized Cromwell to operate managed investment schemes investing in ‘direct real property’ and to carry on a securities business in its capacity as the responsible entity of those schemes. Managed investment schemes are subject to the provisions of Chapter 5C of the *Corporations Law* (ss. 601EA to 601QB), which commenced on 1 July 1998. Under s. 601FB(2) the responsible entity of a registered scheme has the power to appoint an agent, or otherwise engage a person, to do anything that it is authorized to do in connexion with the scheme. That subsection is intended to permit the appointment of a custodian: *Robson’s Annotated Corporations Law*, 6th ed., p. 806. Condition no. 10 of the licence provides that Cromwell must not hold scheme

¹ *Revenue Laws Amendment Act* 2000; see Explanatory Notes 2000 pp 1708, 1714.

² (1933) 49 CLR 84, 97.

property of a registered scheme, but must appoint a custodian to hold scheme property unless certain conditions are met. Condition no. 12 requires a written agreement between Cromwell and a custodian holding scheme property of a registered scheme which must specify certain things. Condition no. 13 requires Cromwell to ensure that each person holding property of a registered scheme does certain things.

- [13] A written 'Custody Agreement' dated 4 October 1999 was entered into by Cromwell as 'The Manager' and the appellant as 'The Custodian'. It recited that Cromwell proposed to be the responsible entity of a scheme called 'Riverfront on Coronation Planned Investment' established by a deed poll, that Cromwell had 'the power and authority to appoint an agent to hold assets in relation to the Scheme', that the appellant had indicated to Cromwell that it was willing to act as custodian of the scheme on the terms and conditions set out in the custody agreement, that in its capacity as trustee and responsible entity of the scheme - and in that capacity only - Cromwell wished to appoint the appellant as custodian of the scheme, and that the appellant had agreed to accept that appointment on the terms and conditions set out in the agreement. By clause 2.1 Cromwell appointed the appellant, and the appellant accepted the appointment as, the custodian of the 'Assets' on the terms and conditions of the agreement. 'Assets' were defined in clause 1.1, the definitions and interpretation clause, to mean the assets of the scheme 'as may be transferred or delivered to the Custodian in accordance with the terms of this Agreement'. Clause 4.1 provided that, '[h]aving regard to the nature of the Scheme, it [was] intended' that the appellant's duties would be, *inter alia*, (a) to enter into a contract to purchase the 'Scheme Property' (defined in clause 1.1 to mean 'the land and all improvements erected on it at 301 Coronation Drive, Milton') and (b) to hold the scheme property on Cromwell's behalf. Clause 4.2(a) provided that the appellant was to hold Assets which were land, unless Cromwell agreed otherwise, in its own name, but, to the extent permitted by 'the relevant Governmental Agency', the appellant was to ensure that all certificates of title recorded the land in question was held by the appellant on Cromwell's behalf. Clause 4.3 provided that, subject to clause 4.4, the appellant was not to effect any transactions 'involving the Assets' unless it had received 'Proper Instructions' and was to give effect to those transactions only in accordance with those Proper Instructions. Clause 4.4 provided for certain other 'Approved transactions' of an administrative character which the appellant might undertake unless it received Proper Instructions to the contrary. 'Proper Instructions' were defined in clause 1.1 to include instructions in relation to the Assets given in any of a number of specified ways and received by the appellant from either Cromwell or a person who was appointed by Cromwell to manage any or all of the land of the scheme and to provide other services to Cromwell in relation to the scheme. Clause 4.8(a) provided that, subject to qualifications provided for in paragraph (b) of that clause which are not relevant to this case stated, the appellant would enter into 'Contracts' when directed to do so by Cromwell in a Proper Instruction. 'Contracts' were defined in clause 1.1 to include a contract to purchase the Scheme Property.

- [14] Clause 4(b) of the standard commercial conditions of the contract of sale, so far as it is relevant, provided that the balance of the purchase price should be paid on the date for completion in exchange for a properly executed transfer of the land from 'the Vendor' to 'the Custodian' capable of immediate registration, after stamping, in the appropriate office. Special condition 11.1 provided that 'the Vendor' and

‘the Purchaser’ acknowledged that ‘the Custodian’ was a party to the contract solely for the purpose of accepting a transfer of the property in its capacity ‘as Custodian of the Riverfront Planned Investment’ scheme pursuant to the custody agreement. Special condition 11.2 provided that ‘the Purchaser’ acknowledged that the consideration for the payment of the purchase price to ‘the Vendor’ and ‘other performance by the Purchaser’ under the contract was satisfied by ‘the Vendor complying with the transfer to the Custodian’ in accordance with clause 4(b) of the standard conditions. Special condition 11.3 provided that the ‘parties’ acknowledged that the rights of ‘the Purchaser’ and ‘the Custodian’ under the contract were several and not joint or joint and several.

[15] Cromwell paid \$17,500,000 as the purchase price, and completion of the sale took place on 29 November 1999. The appellant became the registered proprietor of an estate in fee simple in the scheme property after the registration of a transfer form executed on the date of completion by Riverfront Developments as transferor and Mr Christopher Hansen, solicitor, on behalf of the appellant as transferee.

[16] On 27 March 2000 the respondent issued an assessment notice for the contract of sale, the transfer form, and the custody agreement. The respondent assessed the stamp duty payable on the contract of sale at \$653,475. That assessment was based on the opinion that the contract of sale was chargeable with duty pursuant to s. 54(1) of the *Stamp Act* and paragraph 4(a) under the heading ‘CONVEYANCE OR TRANSFER’ in the first schedule to the Act: \$15,975 plus \$3.75 for every \$100 of the value of the consideration in excess of \$500,000. The respondent assessed the stamp duty payable on the transfer form at \$653,475 also, having formed the opinion that it was subject to duty as a conveyance or transfer as defined in s. 49(1)(a) and so the duty payable on it should also be assessed by reference to paragraph 4(a) under the first schedule heading ‘CONVEYANCE OR TRANSFER’. The stamp duty payable on the custody agreement was assessed at nil.

[17] The respondent had determined that any exemption available to s. 54(6) of the *Stamp Act* did not apply to the transfer form because, to quote paragraph 14(c) of the case stated:

- (i) that transfer was not made to the ‘purchaser’ under the Contract of Sale . . . ;
- (ii) to the extent to which that transfer was made to a person other than the person named as ‘purchaser’ in the Contract of Sale to which the transfer was intended to be pursuant, the Commission was not satisfied that, at the time the Contract of Sale was executed, the person named therein as purchaser was acting in the transaction evidenced by such contract as ‘agent’ for the person to whom the transfer was made, under s. 56(6A); and
- (iii) to the extent to which under the Contract of Sale the purchaser was expressed to be a named person or that named person’s nominee, then for the purposes of s. 54(6A), the ‘purchaser’ named therein could only be taken to be Cromwell and not TCAL, by reason of s. 54(6C).

Sections 49(1)(a), 54(1), 54(6), 54(6A), and 54(6C) of the *Stamp Act* are as follows:

49.(1) For the purposes of this Act-
 ‘conveyance’ and ‘transfer’ include every instrument and every decree or order by a court-
 (a) whereby property is conveyed, transferred or assigned to or is vested in a person

...

54.(1) Any contract or agreement for sale of any property or any contract or agreement whereby a person becomes entitled or may, provided the terms and conditions thereof are met, become entitled to the conveyance or transfer of any property shall be charged with the same duty as if it were an instrument of conveyance of the property.

...

(6) Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer or conveyances or transfers made to the purchaser shall upon production of the contract or agreement or contracts or agreements, duly stamped not be chargeable with any duty, and the commissioner, upon application, either shall denote the payment of the ad valorem duty upon the conveyance or transfer or conveyances or transfers, or shall transfer the ad valorem duty thereto.

(6A) Subsection (6) does not apply in respect of a conveyance or transfer made to a person other than the person named as purchaser in the contract or agreement for sale to which the conveyance or transfer is intended to be pursuant unless the commissioner is satisfied that at the time the contract or agreement for sale was executed the person named therein as purchaser was acting in the transaction evidenced by such contract or agreement as agent for the person to whom the conveyance or transfer is made (either as a general agent or in relation to the particular transaction) and was so acting under authority given to him or her by such person in writing executed prior to the execution of the contract or agreement for sale.

...

(6C) Where to the purchaser under a contract or agreement for sale is expressed to be a named person or his or her nominee, then for the purposes of subsection (6A) the purchaser named therein shall be taken to be such named person.

Subsections 54(2) to (5) are not relevant to the issues before us.

[18] By a notice of objection dated 20 April 2000 the appellant and Cromwell objected to the assessment of stamp duty on the transfer form asserting, *inter alia*, that the assessment should be amended by allowing a full offset of duty paid on the

agreement whereby the subject property was acquired, pursuant to s. 54(6) of the *Stamp Act*. That is the issue before us.

[19] On 12 May 2000 the respondent determined the objection by rejecting it and so the appeal found its way to this court by way of case stated. The questions which were submitted for the determination of the court were these:

- (a) is the Form 1 Transfer (Annexure 'D') an instrument whereby property was conveyed, transferred or assigned to or was vested in the person within the meaning of s. 49(1)(a) of the *Stamp Act 1894*?
- (b) if 'yes' to (a), is the Assessment Notice issued 27 March, 2000 the result of a reassessment by the Commissioner pursuant to s. 80 of that Act?
- (c) if 'yes' to (b), is the original assessment that which is contained in the document entitled 'ASSESSMENT NOTICE', bearing Lodgement Number 011 858 466 - 9 and, if so, is such assessment the result of the forming of the opinion by the Commissioner pursuant to s. 22(2)(a) of that Act that the Form 1 Transfer was not chargeable with any duty because of s. 54(6) of that Act consequent upon duty having been paid on the Contract of Sale (Annexure 'C')?
- (d) if 'yes' to (c), is the assessment of the Commissioner, contained in the Assessment Notice issued 27 March, 2000, on the Form 1 Transfer instrument valid?
- (e) if 'no' to (b), should the appellant be entitled to the benefit of the application of s. 54(6) of that Act?
- (f) is the assessment of the Commissioner contained in the Assessment Notice issued 27 March, 2000 in the sum of \$653,475 on the Form 1 Transfer instrument correct and, if not, what duty, if any, is payable?
- (g) how should the costs of and incidental to the stating of this case and of the appeal be borne and paid?

As the issues between the parties now stand, it is no longer necessary to consider (b), (c), and (d). The conditional clause in (e) can be ignored.

[20] On behalf of the appellant arguments were advanced on the premiss that one should first consider the application of s. 54(6) without reference to s. 54(6A), and then, if necessary, consider the application of s. 54(6A). That premiss cannot be accepted since the provisions of s. 54(6) cannot be construed properly without reference to s. 54(6A) which expressly limits the operation of s. 54(6) except where the condition it provides for is satisfied. It was, however, argued first that if s. 54(6) is read in context the reference to 'the purchaser' in that subsection 'is plainly a reference to the person nominated in the agreement in question as the intended

transferee'. But that cannot be so where purchaser and transferee are different persons, as the provisions of s. 54(6A) show.

[21] Then it was argued that in any event in law the purchaser under an agreement for sale is the person to whom the vendor is bound to transfer the property. It would follow on that analysis that the appellant was the purchaser of the land and hence the exemption provided for s. 54(6) would apply to the transfer. Reliance was placed on the quotation with approval of a passage in *Benjamin on Sale*, 8th ed., p. 2 by Viscount Simonds in *Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners* [1963] A.C. 135 at p. 152. His Lordship was there discussing whether a deed called a deed of exchange should be assessed for stamp duty as conveyance or transfer on sale. The quoted passage appears in Chapter 1, which deals with the form and essential elements of the contract of sale of personal property. The learned author explained on p. 1 that in order to constitute a sale there must be:

(1) An *agreement to sell*, by which alone the property does not pass; and (2) an *actual sale*, by which the property passes.

He then noted that it would be observed that the definition of a contract of sale in s. 1(1) of the *Sale of Goods Act 1893* (56 & 57 Vict. c. 71) included a mere agreement to sell as well as an actual sale. He continued on p. 2: 'By the common law a *sale* of personal property was usually termed a "bargain and sale of goods" '. Then followed the quoted passage:

It may be defined to be a transfer of the *absolute* or *general* property in a thing for a price in *money* . . . Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, *viz.* :-

(1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised.

The next two paragraphs concerned the first three elements:

That it requires parties competent to contract, and mutual assent, in order to effect a sale, is manifest from the general principles which govern all contracts.

The third essential is that there should be a transfer of the *absolute* or *general* property in the thing sold; for in law a thing may in some cases be said to have in a certain sense two owners, one of whom has the general, and the other a special property in it; and a transfer of the special property is not a sale of the thing.

It will be observed that the nub of the third element as explained in the last-quoted paragraph is not transfer from seller to buyer but rather transfer of the absolute or general property in the thing.

[22] While the purchaser under a contract of sale of land will generally be the transferee of the land it does not follow that the transferee is always the purchaser. A purchaser has the right at common law to nominate a transferee to take title instead of the purchaser, unless of course the vendor and purchaser exclude that

right by agreement: *Egmont v. Smith* (1877) 6 Ch. D. 469 at p. 474, *Re Davies* [1989] 1 Qd. R. 48 at p. 53, and *Peter Butt*, ‘Purchaser “or nominee”’ (1997) 71 A.L.J. 12. Mr Butt continued:

If the purchaser exercises the right, the vendor must transfer the property to the nominee instead of to the purchaser. However, a nomination does not substitute the nominee as the purchaser. The parties to the contract remain the vendor and the purchaser. If the purchaser breaches the contract, it is to the purchaser that the vendor must look for recourse, not the nominee: *Nguyen v Taylor* (1992) 27 NSWLR 48 at 60. In this regard, a nomination is to be contrasted with an assignment of the contract. An assignee becomes entitled to all the purchaser’s rights under the contract, once notice has been given to the vendor: *Shaw v Harris* (No 2) (1992) 3 Tas R 167 at 207. A nomination is also to be contrasted with a novation of the contract. A novation substitutes a new contract for the old one: *Olsson v Dyson* (1969) 120 CR 365 at 389.

- [23] Special conditions 11.1 and 11.3 of the contract of sale make it clear that the appellant was restricted to the role of transferee and that the role of purchaser, as it is understood in this context, fell to Cromwell and to it alone. That conclusion is enough to dispose of the argument advanced for the appellant that the appellant is entitled to the exemption provided for in s. 54(6).
- [24] A further argument for the appellant focussed on s. 54(6A). It was that if Cromwell was in law the purchaser named in the contract then ‘the requirements for the Commissioner’s satisfaction that Cromwell was acting at the prior written behest of the Appellant cannot have been better demonstrated than by the Appellant being named in the Contract for Sale and executing that agreement as the intended transferee of the property’. There is, however, nothing before us that could have led to the conclusion that Cromwell was acting in the transaction evidenced by the contract as agent for the appellant. Rather than demonstrating Cromwell’s acting at the prior written behest of the appellant, the facts as they have been put to us reveal the appellant’s acting at the behest of Cromwell. The recitals to, and clauses 2.1, 4.1(a) and (b), 4.2(a), 4.3, 4.8(a) of, the custody agreement show that.
- [25] It is unnecessary to consider an argument advanced on behalf of the respondent based on amendments to the *Stamp Act* made by the *Revenue Laws Amendment Act* 2000 in November last year.
- [26] It follows that the appeal against the respondent’s assessment should be dismissed and the answers to the questions for our determination should be:
- (a) Yes;
 - (b) Unnecessary to answer;
 - (c) Unnecessary to answer;
 - (d) Unnecessary to answer;
 - (e) No;
 - (f) Yes; and
 - (g) The costs of and incidental to the stating of this case and of the appeal should be borne and paid by the appellant.